



RAVALLI COUNTY ATTORNEY

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Memorandum

RECEIVED

OCT 15 2008

Ravalli County Commissioners

TO: Ravalli County Commissioners

FROM: Karen Mahar, Deputy 

DATE: October 10, 2008

RE: Resolution No. 2289 – Commissioners Support of Ravalli County Growth Policy

Dear Commissioners,

On September 30, 2008, Glenda forwarded our office your proposed Resolution 2289 with a request on behalf of the Board to review the proposed Resolution to determine whether its adoption would violate §2-2-121(3), MCA. The pertinent portions of this statute provide:

2-2-121. Rules of conduct for public officers and public employees.

(3) (a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or
(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) ... With respect to ballot issues, properly incidental activities are restricted to:
(i) the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations;

...
(c) This subsection (3) is not intended to restrict the right of a public officer or public employee to express personal political views.

Our office has reviewed the text of the proposed Resolution, which memorializes Commissioner support for the Ravalli County Growth Policy, which was initially adopted by the Commissioners under §76-1-604, MCA. It is our conclusion that proposed Resolution 2289 does not violate 2-2-121, MCA.

First, the proposed Resolution seems to fall squarely under the exception articulated in §2-2-121(3)(b)(i) in that it relates to determining the impact of passage or failure of a ballot issue on local government operations (e.g. planning and community development). The Commissioners are authorized by law to

adopt, revise, or repeal a county growth policy under §76-1-604, MCA. This statute further authorizes the Commissioners to submit to the electors the issue of whether a growth policy should or should not be adopted. §76-1-604(2), MCA. Once a growth policy has been adopted, as it has in Ravalli County, the governing body must be guided by and give consideration to the growth policy in a number of its government operations as specifically set forth in §76-1-605, MCA. Further, the Commissioners are required to consider the Growth Policy in making their decision whether or not to approve proposed subdivision applications. See §3-2-8(c)(v), RCSR. In other words, the current ballot issue proposing to repeal the Growth Policy directly impacts local government operations.

Second, recent Montana case law makes a distinction between advocating issues which impact the legislative function of a government agency from purely partisan political issues. In the recent case of Montana Sports Shooting Ass'n v. State of Montana, 2008 MT 190, the Montana Supreme Court held that a statutory restriction specifically prohibiting Fish, Wildlife & Parks from using its official authority to propose or oppose legislation applied only to partisan political issues. The opinion noted that to apply the statute restricting FWP (which is more restrictive than the "general prohibition on public employee's political activity under 2-2-121, MCA,") to proposed legislative issues would prevent that agency from fulfilling its statutory obligations. Montana Sports, ¶16. Similarly here, the Commissioners should be allowed to propose or oppose legislative or regulatory action in order to fulfill its statutory obligations to manage public ways and utilities and oversee subdivision and zoning proposals.

Although some citizens may feel the issues of growth, land use, and zoning are in a sense partisan issues, this is only true in the sense that one party may be more supportive or opposed to the issue than another. The ballot issue in fact involves the specific issue of the Growth Policy, which is a non-regulatory document established to guide the operations of the local government, rather than a statement on a partisan political issue. This conclusion is supported by a 2006 letter of advice from the Attorney General, which explained that "operation of county governments will necessarily have a substantial impact upon county interests and upon 'good government' as provided by the counties;" thus, a commissioner funding or participating in an agency exercising its constitutional right to participate in the ballot issue process on legislation affecting county operations is not violative of §2-2-121. This letter of advice again points to an interpretation of law in this area that encourages government agencies to be allowed to express views on proposed legislation which affects how that government agency operates, buttressing the conclusion that Resolution 2289 is permissible under the statutory exception set forth above.

Finally, similar issues have been raised and addressed in regard to Commissioner statements in favor of land use planning ballot issues before, and we have previously concluded that such statements are permissible as incidental to local government operations. Attached is a copy of a Valley Viewpoint article authored by the three county commissioners in office when the current Growth Policy was submitted to a vote in 2004. Also attached is an opinion from our office in 1998 holding that the Commissioners could circulate a flyer in support of a proposed master plan that had been placed on the upcoming election ballot. Thus, the current proposed Resolution would be consistent with past practices in the County of allowing the Commissioners to publicly comment on planning issues affecting government land use operations.

(Ravalli Republic 10/19/04)

POPS, NO NHL HOCKEY!
WHAT ARE WE GOING TO
DO FOR A GOOD FIGHT?

YANKEES AND RED SOX
GOT US COVERED THROUGH
NEXT WEEK.



WHO'S YOUR DADDY!?

Commissioners: Vote yes on growth policy

Your Ravalli County commissioners, would like to inform the citizens of the county about the growth policy issue, which will be on the November 2 general election ballot.

Valley Viewpoint

Betty Lund
Greg Chilcott
Alan Thompson

After countless hours of debate and discussion to arrive at a consensus from this group, a growth policy was presented for public hearings before the planning board. Following the public hearings and citizen input, the document was further amended. The final growth policy was sent to the county commissioners for their consideration. On Dec. 31, 2002, the county commissioners adopted a growth policy in compliance with Montana law.

On April 7, 2003, the county commissioners amended the policy to allow it to expire unless a majority of the voters of Ravalli County vote to retain the policy at the November general election.

Recognizing that there were still some citizens who wanted to provide more input to the document, the

All Valley Focus group had more meetings to consider their concerns. Once these concerns were addressed, the planning board recommended approving the growth policy in August of this year. The document was then forwarded to the county commissioners for their consideration and review.

In August of this year the county commissioners labored over the document, downsizing it from 116 pages to 53 without losing the intent of the document. We recognize this is not a perfect document; we also know it will be amended as future circumstances dictate. Our goal is to have a policy to assist us in defining future land-use patterns and in making planning decisions for the citizens of Ravalli County. Managed, well planned growth will not only maintain, but should enhance future land values, while providing a more efficient use of the public tax dollars and infrastructure costs.

The growth policy provides an opportunity to have better countywide land use planning in order to help make new land uses consistent with existing neighborhoods. It also provides more local control rather than state or federally imposed control over Ravalli County land use decisions.

We commend our agricultural community for their outstanding land stewardship and intend to support their lifestyle while maintaining their options.

We hope the citizens of Ravalli County will join with the county commissioners in supporting this revised growth policy at the polls on Nov. 2, 2004.

Respectfully submitted,

Ravalli County Board of Commissioners

Betty T. Lund, chairman

Greg Chilcott, vice chairman

Alan Thompson, senior member

RAVALLI COUNTY ATTORNEY MEMORANDUM

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RECEIVED

AUG 28 1998

Ravalli Co. Planning Office

TO: Commissioners\Election Administrator
FROM: George Corn *GC*
DATE: August 26, 1998
RE: Vision 2020: Ballot question\Public Officer\Public Employees Involvement

Kevin and Tim sent me the attached memo. I am answering the questions in this memo but since most of the questions concern policy matters that must be answered by you, I am responding to you with a cc. to them.

1. What may the clerk and recorder publish in the voters pamphlet concerning Vision 2020?

There is no applicable Montana law that I could find that describes how county ballot issues are to be dealt with in a voters' pamphlet. The section of law dealing with state-wide ballot issues, Section 13-27-101, et. seq., M.C.A., requires, among other things, that a pro and con argument be devised for a ballot issue pamphlet. Since this law is only for state-wide issues, I believe it is sufficient for Betty to publish in the voters' pamphlet the text of the attachment to resolution 917 titled "Vision 2020 Policies-Ravalli County Comprehensive Plan Update." I believe this is consistent with what she has done in the past.

2. Should an updated version of the Vision 2020 flyer be distributed by the Planning\Office\Planning Board?

This question requires several answers. The first must be answered by the Commissioners. They must decide whether any flyer at all should be distributed. This question is entirely within their discretion.

The second question concerns whether such distribution of this particular pro-plan flyer is legal. Section 2-2-121(3), M.C.A., in general, forbids a public officer or public employee to use time or funds for any campaign activity persuading or affecting a political decision. As noted by Gordon Morris in the latest MACO newsletter, normally local government officials are limited to providing "information" only in reference to voter initiatives.

However, here the ballot is not a voter initiative and Section 2-2-121(3)(b), M.C.A. does provide exceptions. These exceptions allow spending public resources to persuade or effect a political decision if the use is authorized by a law or properly incidental to another activity required or authorized by law. Section 2-2-121(3)(b) M.C.A.

The question here is whether this activity (the flyer) is either authorized by law or properly incidental to another activity required or authorized by law.

In the instant case, the County Commissioners adopted the Vision 2020 Plan on August 4, 1998, in Resolution 917. In the same resolution, they resolved to place the matter before the voters for approval and put into place directives to the Planning Board to advise the Commissioners on how to make the 1981 Comprehensive Plan "compatible and consistent" with the Vision 2020 Plan if it passes.

The Commissioners' actions in placing the matter on the ballot are authorized by Section 76-10-604, M.C.A. This statute specifically states that the commissioners shall adopt a resolution to "adopt, revise or reject a proposed plan." See Section 76-1-604(1). Further, if the governing body adopts a resolution of intention to adopt the proposed plan or any of its parts, they may submit to the voters the question of whether or not the plan should be adopted. Section 76-1-604(2), M.C.A.

Although the resolution of August 4, 1998, could be much better written, arguably it shows the Commissioners' intent to adopt the plan. Since the Commissioners intend to adopt the plan and are authorized by law to place it on the ballot for the public to vote on, it is properly incidental to their duties to explain to the public why it should be adopted. Accordingly, a partisan flyer authorized by the commissioners is allowable by law.

As for the Planning Board, you will note that it is specifically charged with preparing and proposing a master plan. Section 76-1-601, M.C.A. Also, the Planning Board is required to recommend the proposed master plan to the governing body. Section 76-1-603 M.C.A. Therefore, it follows that the Planning Board is entitled to distribute the flyer since it is incidental to the board's statutory duty of formulating a plan and taking a position on it. This assumes the board has the budget to undertake this activity.

As for the Planning Department, I find no statutory duty to allow its employees to do anything other than what the Commissioners direct. This means the Department may not promote or pass out the flyer unless the Commissioners authorize their actions. Department employees must act under the direction of the Commissioners in this matter. If they do not, they are in violation of Section 2-2-121, M.C.A., violations of which are a misdemeanor.

This means there must be specific authorization by the Commissioners for any Planning Department employee's activity associated with the promotion of Vision 2020. In particular, they should not be at a booth at the fair or having anything to do with a flyer unless authorized by you. To be on the safe side, the employees should seek the Commissioners' approval even for the providing of neutral information.

There is still another question you need to consider. Namely, should any public money be spent on printing or passing out the flyer even if it is technically legal? The reason you need to consider this is that spending public money in some instances around the state has caused a backlash and has become an issue in and of itself. This has diverted attention from the major issue, which is the merits of whether the ballot issue in question should be adopted. This is a judgment call you must make.

Much depends on your assessment of whether such a reaction is possible here. Much depends on the wording of any particular flyer and the amount of money spent and public resources devoted to promoting the plan. This is strictly a judgment call on your part. Please do not hesitate to call on me if you have further questions.

cc: Planning Office